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March 1, 2006

Chairman Kevin Martin
Commissioner Kathleen Q. Abernathy
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Taylor Tate
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ex parte – electronic filing

Re: ***Ex Parte* -- In the *Matter of Application for Consent to the Assignment and/or Transfer of Licenses: Adelphia Communications Corp., et al, Assignors, to TW Cable, Inc., et al., Assignees, etc.* MB Docket No. 05-192 –**

Presentation of Maine Attorney General
Seeking Divestitures of Maine Assets

Dear Chairman Martin and Commissioners Abernathy, Copps, Adelstein & Tate:

The Attorney General of Maine respectfully submits this *ex parte* written presentation pursuant to Commission Rule 1.1206, 47 CFR §1.1206, for the purpose of bringing serious public interest concerns to the Commission's attention.[1] We believe the pending acquisition by Time Warner Cable, Inc. ("TW") of Adelphia Communications Corp. ("Adelphia") assets in Maine would sharply reduce competition in the relevant Maine market, create an effective monopoly and bar new entry, causing serious harm to Maine's municipalities, citizens, businesses and economy, in violation of Maine and federal antitrust laws. Accordingly, **we respectfully urge the Commission to condition its general approval of the license transfers and assignments sought in this proceeding on appropriate divestitures of Maine assets, and to deny the transfer and assignment to TW of licenses associated with those assets designated for divestiture.**

[1] Consistent with Commission Rules, two copies of this written *ex parte* communication have been submitted to the Secretary.

As Maine's chief law enforcement officer, the Attorney General is charged with the enforcement of Maine antitrust laws, including a merger statute modeled on the Clayton Act, 10 MRSA §1102-A, and possesses broad common law powers, as well as powers accorded by federal statute, to act as *parens patriae* on behalf of Maine citizens in the public interest. *Lund ex rel. Wilbur v. Pratt,* 308 A.2d 554 (Me. 1973); 15 USC §15c. The Attorney General administers an active antitrust program; over the past twenty years this office has filed 57 antitrust cases, twenty of them merger actions.[2]

The pending acquisition holds significant implications for Maine citizens, municipalities and businesses generally. However, the stakes in this proceeding may be particularly high for our rural citizens and businesses. In the comments offered below, while representing the interests of all Mainers, the Attorney General expresses special concern for rural Maine.[3]

I. **<u>The TW-Adelphia acquisition would substantially reduce competition in the relevant Maine market, in violation of state and federal law.</u>**

The TW-Adelphia acquisition will, if approved and consummated without conditions, substantially reduce competition in the relevant Maine market, in violation of 10 MRSA §1102-A.[4]

A. Relevant market. The primary relevant product market within which to assess the impact of the pending acquisition in Maine is the market for municipal cable franchises within which cable providers compete to win franchises, and municipalities, relying on the benefits of competition, compare the track records of rival prospective franchisees on such matters as price, universal service and contract compliance; bargain with prospective franchisees concerning prices and franchise terms for the benefit of their citizens;[5] select franchisees; and seek to hold incumbent franchisees accountable for compliance with agreed-upon contractual terms ("franchise market").[6] It is important to note that in rural Maine, cable possesses a special economic significance, since for many

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[2] *See generally Comments of the Maine Attorney General On The Role of States In Enforcing Federal Antitrust Laws Outside the Merger Area, July 15, 2005*, available at www.amc.gov. It bears note, however, that the resources available to our antitrust program are few: currently, only two attorneys are assigned to antitrust matters, and both have other, concurrent responsibilities. As a result, we sometimes become aware of important concerns, and come to the table with them, later than we could wish. We regret any inconvenience to the Commission that may arise from the lateness of our request for relief in this instance.

[3] Maine's population of approximately 1.3 million is 60 % rural. *See, e.g.,* www.classbrain/artstate/publish/article_1240.shtml.

[4] Section 1102-A prohibits mergers and acquisitions when "the effect … may be substantially to lessen competition or tend to create a monopoly."

[5] We do not intend to suggest that municipalities retain any regulatory power to set price; our point is that price is one matter, along with quality and universality of service, which would interest municipalities whose franchise contracts were up for renewal. Under normal competitive circumstances, a municipality would enjoy some leverage to persuade an incumbent to reduce rates or improve service.

[6] Satellite providers do not compete in this primary market; rather, they participate in a secondary market within which they vie for customers with the cable providers installed as franchisees ("customer market"). The extent to which satellite service can be considered an adequate substitute for cable remains controversial.

citizens and businesses, it represents the only available means of obtaining high-speed internet access.

In our view, the geography of this franchise market is coextensive with the State of Maine.[7]

B. Effective monopoly. Currently, prior to the pending acquisition, Adelphia possesses a dominant 54% market share in Maine, measured by numbers of cable subscribers. TW, Adelphia's closest rival, holds a 31% share; all other competitors register below 7%. The acquisition of Adelphia's Maine assets would thus give TW an 85% market share—an effective monopoly— and produce results detrimental to competition and the public interest.

The level of concentration in the Maine cable franchise market prior to the acquisition is illustrated by the Herfindahl-Hirschman Index shown in Table 1:[8]

Table 1: Maine Cable Franchise Market: Pre-acquisition Market Shares & Herfindahl-Hirschman Index

Cable provider	Subscribers	Mkt share	Square
Adelphia	177,071	54%	2916
Time Warner	101,996	31%	961
Comcast	20,959	6.4%	41
Polaris	4,051	1.2%	1.44
Pine Tree	2,928	1%	1
Moosehead	909	<1%	
Lincolnville	1,000	<1%	
Mattawamkeag	285	<1%	
Pleasant Ridge	40	<1%	
Metrocast	9,425	3%	9
Sherman	172	<1%	
Bee Line	10,000	3%	9

Pre-acquisition HHI 3938[9]

[7] This view rests primarily on the ground that regulatory systems governing cable vary significantly from one State to another.

[8] *See* US Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines*, rev'd April 8, 1997 ("Joint Merger Guidelines"). "Herfindahls" or "HHIs" (shorthands for "Herfindahl-Hirschman Index"), familiar to economists and antitrust lawyers as a means of measuring concentration in any given market, are employed in the Joint Merger Guidelines as an element of the inquiry necessary to evaluate a merger under the Clayton Act. Maine also employs the Joint Merger Guidelines in assessing a merger's compliance with state antitrust law.

[9] These data derive from Warren Communications statistics. Note that Table 1 substitutes Comcast for Suscom, on the assumption that the proposed Comcast-Suscom acquisition will receive the necessary approvals; and does not reflect the fact that, in addition, Comcast holds Maine franchises in the Towns of Kittery and Eliot, Maine, that are linked to its head end located in Portsmouth, NH. The number of subscribers in those two franchises is small – estimated to be no more than 2500.

In their Joint Merger Guidelines, federal antitrust authorities have established three levels of concentration. An HHI below 1000 betokens an" unconcentrated" market. Above 1000, a market is "concentrated;" a merger which increases the HHI by 100 or more to reach a total above 1000 is likely to draw an antitrust challenge unless other factors dictate a contrary result. Finally, a market whose HHI exceeds 1800 is described as "highly concentrated;" an acquisition producing an increase of 50 or more to attain a total above 1800 is also likely to draw a challenge.

Maine's franchise market prior to the acquisition is already "highly concentrated," with an HHI more than double the federal threshold of 1800. Combining the two leading competitors would all but double the HHI again, as shown in Table 2:

Table 2: Maine Franchise Market Post-acquisition HHI

Pre-acquisition	3938
Increase	3348

Post-acquisition HHI: 7286[10]

C. Anti-competitive effects. The contemplated transaction would have a powerful anti-competitive impact. Some specific areas in which its effects would be felt are described below:

1. New entry, existing competition and critical mass. Survival in a given franchise market requires, among other things, some measure of "critical mass" in terms of both territory (*i.e.*, an agglomeration of contiguous franchises) and numbers of subscribers. A larger consolidated territory allows a company to make more efficient and economical use of technology, and in addition gives it greater visibility and credibility as a competitor. Similarly, a larger subscriber constituency allows an enterprise to "buy better," *e.g.*, to obtain programming at a discount; and to spread its costs over a larger base. Without such critical mass it becomes increasingly difficult for a competitor to assure its subscribers of either desirable quality programming or reasonable rates, and franchisors may be inclined to conclude that the company lacks credibility.

The necessity of attaining a measure of critical mass is not, however, an argument for unregulated monopoly. If only one company in a given market possesses the requisite critical mass, it will have little incentive to pass efficiencies along to subscribers. Accordingly, here as in other economic sectors, sound antitrust policy seeks to foster competition among a number of competitors on some approximation of an equal footing.

If the contemplated acquisition is approved without conditions, however, there will be no new competition in Maine's franchise market; rather, what little competition

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[10] Even if satellite providers are included as full competitors, the HHI for this market remains extremely high, with a pre-acquisition index of 2564 increasing by 1794 to a post-acquisition 4358. Again, these figures derive from Warner Communications statistics.

remained would be likely to atrophy. Potential competitors considering entry into the Maine franchise market, as well as small local cable providers struggling to survive, would reassess their ability to attain the required critical mass. Potential new entrants would conclude, in all likelihood, that the task of building a rival system capable of challenging TW's dominance in Maine was simply unfeasible. By the same token, existing competitors would come under increasing pressure to exit quietly, and could hardly be faulted if they succumbed, further eroding competition.[11]

3. Municipal bargaining power. In the wake of the proposed acquisition, municipalities and their citizens would face a world in which competition and choice had all but ceased to exist. With new entry choked off, local expansion stifled, and competition withering on the vine, franchisors would search in vain for some means of exerting leverage on TW to obtain a better bargain for their citizens – or, for that matter, to persuade it to abide by the terms of existing deals. In all probability, municipalities would find themselves communicating with a distant headquarters, ill-informed about local conditions and geography; it seems fairly predictable that attempts to negotiate would be met with a standard company contract, with little or no variation permitted.

4. Citizens and small businesses. It is axiomatic in antitrust law and economics that substantially reduced competition tends to result in higher prices and lower quality goods and services. The Maine cable franchise market is not exempt from the operation of this principle. Unless appropriate conditions are imposed, the contemplated transaction will substantially reduce competition; and Maine subscribers and small business can expect to foot the bill in higher rates and lower quality service.

5. High-speed internet service is essential to rural businesses. For rural Maine, access to cable is often the only means of obtaining a high-speed internet connection. High-speed internet access, in turn, is essential to the ability of rural businesses to enter and compete in sophisticated regional, national or global markets.[12] Currently, significant sections of rural Maine are served neither by cable nor by DSL.[13]

These rural areas already face numerous obstacles along the path to development. With competition effectively at a standstill following the proposed acquisition, competitive incentives to expand cable and internet access will disappear. TW's market dominance will in itself interpose a new barrier to rural prosperity.

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11 The pending Comcast acquisition of Suscom may be a case in point. We suspect that there may be an intention for Comcast to deal the Suscom franchises it acquires to TW, in exchange for TW properties elsewhere that would integrate more readily into Comcast's empire. This office would oppose any such franchise swap.

12 *See, e.g.,* Editorial, *Speed Net Access For Rural Maine,* Portland Press Herald, January 19, 2006, p. A10 (high speed internet access could spur economic development in rural sections of the State; this is one area in which "market forces need help").

13 *See* Free Press, *Wireless Internet Service in Rural Areas Is Incredible*, January 2, 2006. Sources at the Maine Public Utilities Commission inform us that DSL penetration in Maine is in the vicinity of 60%.

II. An appropriate remedy: require significant divestitures.

For all the foregoing reasons, we urge the Commission to condition general approval of the license assignments and transfers sought in this proceeding upon divestiture by TW of the cable franchises it proposes to acquire from Adelphia in Maine. A possible alternative would call for divestiture, in economically viable segments, of sufficient cable franchise assets to reduce TW's post-acquisition market share in Maine to no more than 54%, *i.e.*, Adelphia's current share.

If it is disposed to require any divestitures, the Commission should structure the divestiture process in such a way as to afford a genuine opportunity to interested cable providers within and outside Maine to participate, and attain the critical mass they need to become full competitors. Simply put, the process should encourage the development of a number of credible rivals to TW, and avoid a result that would merely restore the pre-existing duopoly. For this reason, the franchises to be divested should be aggregated so as to offer economically viable units consisting of multiple franchises, but not units so large as to effectively limit the pool of potential bidders or the number of eventual buyers.

Further, the Commission should deny transfer or assignment to TW of any Adelphia CARS Station or TVRO Earth Station licenses associated with the assets to be divested, and award them instead to the parties acquiring those assets pursuant to the Commission's decision.[14]

Conclusion. We are grateful for the Commission's willingness to consider these points. This office is at the Commission's disposal to discuss divestiture options as well as the design and administration of the divestiture process, if this would be useful to the Commission. We would also be happy to respond to questions, and assist the Commission in any other way.

Finally, we concur with the comments offered by the District of Columbia Attorney General in his *ex parte* presentation dated February 3, 2006.

Respectfully submitted,

FRANCIS ACKERMAN
Assistant Attorney General

FA/gm

pc: Marlene H. Dortch, Secretary, FCC (two copies)
Donna Gregg, Chief, Media Bureau, FCC

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14 The pending Applications indicate (*see* Appendix P) that transfer and assignment of five CARS Station licenses and twelve TVRO Earth Station licenses for facilities located in Maine are sought.